



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 11, 2002

Mr. Stephen C. Jacobs
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3400 Chase Tower
600 Travis Street
Houston, Texas 77002-3095

OR2002-7049

Dear Mr. Jacobs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173477.

The Houston Area Water Corporation (the "corporation") received a request for eighteen categories of information related to the corporation.¹ You state that the corporation "is proceeding with providing information to the Requestors which does not fall into the listed categories of exceptions." You claim that the submitted information is excepted from disclosure under sections 552.103, 552.105, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹Specifically, the requestors seek information relating to the corporation's formation; City of Houston ("city") ordinances relating to the corporation; correspondence relating to the operation of the corporation; copies of amendments to a particular agreement; copies of lease agreements between the corporation and the city concerning the Water Facilities; copies of a particular ordinance and lease agreement; copies of information pertaining to rights of way; copies of correspondence related to the operation of the corporation's Water Facilities; copies of certain charts, maps, and surveys; information relating to the corporation's directors; copies of certain surveys, studies, and agreements; copies of documents relating to a particular ordinance; information relating to the expansion of the Water Facilities; correspondence between the city and the corporation regarding the acquisition of rights of way; and information relating to payments made by the corporation to the city concerning rights of way.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first address a procedural matter. Section 552.301 requires the timely submission of information to this office when a governmental body seeks an open records ruling. You state that the request was addressed to and received by a city employee, Mr. Gary Oradat, who was neither an officer nor an employee of the corporation. You explain that Mr. Oradat forwarded the request to the corporation, which received the request on September 25, 2002. In this instance, we believe that the corporation received the request for information on September 25, 2002. *See* Gov't Code § 552.301(b). Thus, the corporation has complied with the deadlines imposed by section 552.301.

Section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Gov't Code § 552.022. Section 552.022 states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108" Gov't Code § 552.022(a)(1). We understand that the submitted appraisal report is not completed and so is not covered by section 552.022.³

We now address your arguments with respect to the submitted information. You claim that section 552.103 excepts from disclosure the information in Tab A. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.-Austin 1997, no pet.); *Heard*

³Sections 552.103 and 552.105 are discretionary exceptions and not "other law" for the purposes of section 552.022. *See, e.g.*, Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Thus, these exceptions cannot apply to a completed report subject to section 552.022(a)(1).

v. Houston Post Co., 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you state that the requestor initially denied the corporation access to certain property in order to prevent the corporation from surveying it; that the requestors deem the legislation establishing the corporation unconstitutional; that the requestor has declined all offers from the corporation to purchase an easement; and that you have received correspondence from the requestor's counsel in anticipation of a meeting the requestor characterizes as "settlement discussions." Finally, you state that the city has, by ordinance, "made a determination of public necessity for the easements and, by prior ordinance, engaged the corporation to provide certain services preparatory to condemnation should that become necessary." Based on our review of your arguments and the submitted information, we conclude that litigation was reasonably anticipated the date the corporation received the request for information, and that the submitted documents relate to the pending litigation for purposes of section 552.103(a). *University of Tex. Law Sch.*, 958 S.W.2d at 483.

We note that some of the submitted information within Tab A has been seen by the opposing party. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion

MW-575 (1982); Open Records Decision No. 350 (1982).⁴ Otherwise, you may withhold the information in Tab A from disclosure under section 552.103.⁵

You next assert that drafts of a municipal ordinance submitted at Tab B are excepted from disclosure under section 552.106(a). Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation." Gov't Code § 552.106(a). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. This office has concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted from disclosure by section 552.106. Open Records Decision No. 248 (1980). We find that the information at issue, as draft copies, reflects internal policy judgments, recommendations, and proposals. Therefore, we agree that the submitted drafts of the municipal ordinances at Tab B are excepted from disclosure in their entirety based on this exception.

You assert that information submitted at Tab D is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). *See also* Open Records Decision No. 676 (2002) (section 552.107(1) excepts a client government body's communications as defined by Texas Rule of Evidence 503). Section 552.107(1) does not except purely factual information from disclosure. Open Records Decision No. 574. Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* We agree the information you have submitted at Tab C constitutes client confidences and attorney advice and opinion. Therefore, you may withhold this information from disclosure under section 552.107(1).

Next, you argue that the information submitted at Tab D is excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intra agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department*

⁴ In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

⁵ In light of our conclusion under section 552.103, we need not address your section 552.105 claim for the drafts of appraisals of the requestor's property and properties adjacent to the requestor's property.

of Public Safety v. Gilbreath, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld from disclosure under section 552.111 of the Government Code. *See* Open Records Decision No. 559 (1990). An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993).

Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted from disclosure by section 552.111. *Id.* Furthermore, while section 552.111 is most commonly used to withhold information from disclosure generated by the personnel of a governmental body, section 552.111 also encompasses information created by an outside consultant for a governmental body acting on behalf of the governmental body in an official capacity. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). Section 552.111 does not apply unless the agencies between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

You state that the requested information submitted at Tab D "consists of advice, opinions, or recommendations in a deliberative process." Based on your representations and our review of the submitted information, we agree that portions of the information submitted at Tab D are excepted from disclosure under section 552.111 of the Government Code. We have marked the information that you may withhold from disclosure under this exception.

You claim that the information submitted at Tab D constitutes attorney work product that is also excepted from disclosure under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)).

In this case, you state that the information “has been obtained in anticipation of litigation and contains information which would tend to reveal mental processes and conclusions.” Based on the above representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. Furthermore, having reviewed the information at issue, we conclude that the some of the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the corporation may withhold the information we have marked as attorney work product under section 552.111 of the Government Code.

In summary, the information submitted at Tab A may be withheld from disclosure under section 552.103. We note, however, that if the opposing parties have seen or had access to this information, there is no section 552.103(a) interest in withholding it from disclosure. The drafts of municipal ordinances submitted at Tab B may be withheld from disclosure under section 552.106(a) of the Government Code. Information pertaining to client confidences and attorney advice and opinion submitted at Tab C may be withheld from disclosure under section 552.107(1). We have marked the information in Tab D consisting of advice, opinions, or recommendations in a deliberative process, which may be withheld from disclosure under section 552.111. We have also marked the information in Tab D consisting of attorney work product which may be withheld from disclosure under section 552.111. The remaining information in Tab D must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 173477

Enc: Submitted documents

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